No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

WASHINGTON BREWERS INSTITUTE, a corporation, *et al.*,
Petitioner (*Appellant below*),

vs.

UNITED STATES OF AMERICA,
Respondent (*Appellee below*).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WASHINGTON BREWERS INSTITUTE, *et al.*,
Petitioners,

By R. M. J. ARMSTRONG
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I.

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit in this cause is reported in 136 F.(2d) ..... (R. 174).

II.

JURISDICTION

(1) The date of the judgment to be reviewed is August 13, 1943 (R. 185).

(2) The specific contentions advanced and rulings made in the lower court which are relied on as the basis of this court's jurisdiction are:

(a) Since the adoption of the Twenty-first Amendment the Federal Government has no jurisdiction over commerce among the states in intoxicants. The Cir-

cuit Court, in summarily disposing of this contention said:

> "But we think the amendment does not deprive the national government of all authority to legislate in respect of interstate commerce in intoxicants. There is nothing in the verbiage of the provision, and little in its legislative history, to support so broad a view." (R. 178-9) (136 F. (2d) .....)

(b) At least, the Federal Government is without authority to legislate in that field (regulating commerce in intoxicants) when any state or territory has occupied the field by appropriate legislative action.

The Circuit Court, in disposing of this contention, recognized "the practically unlimited power of the states to regulate or prohibit the importation of alcoholic beverages, irrespective either of the Commerce or the Equal Protection Clause of the Constitution" (R. 177-8).

The court further held that while the Twenty-first Amendment "does not in terms transfer power to the states, it does free them from a previous constitutional restriction" (R. 180).

The Circuit Court further held that the state laws involved (summarized in appendices hereto) are, in many respects, incompatible with the policy of the Sherman Act, and "wherever such conflicts exist, the Sherman Act must give way, just as the Commerce Clause itself gives way in identical circumstances" (R. 181).

The Circuit Court held:

> "Interstate commerce in liquor, not in violation

of state law, was left, as before, a matter of national concern." (R. 181)

The court further found the existence of state laws forbidding the restraints of trade or the fixing or maintaining of artificial and non-competitive prices, which laws are applicable to beer (R. 182). But, in spite of this finding, that the acts charged in the indictment were a violation of state laws, as noticed, and of its conclusion that if acts charged did violate such laws such commerce was not a matter of national concern, it upheld the conviction under the Sherman Act.

(c) The indictment involving intoxicating liquor is insufficient in that it does not negative the fact that the acts charged have been "commanded or implicitly encouraged" by state laws.

This contention was not noticed by the Circuit Court.

(3) The statutory provision under which jurisdiction is invoked is Sec. 240(a) of the Judicial Code, as amended (28 U.S.C.A., Sec. 347).

(4) The following cases are believed to sustain the jurisdiction of the Supreme Court:

State Board of Equalization v. Young's Market, 299 U.S. 59;

In re 620 Church Street Building Corp., 299 U.S. 24;

U. S. v. Gulf Refining Co., 268 U.S. 542;

Warner v. New Orleans, 167 U.S. 467.

III.

STATEMENT OF THE CASE

The petitioners are companies or corporations engaged in the manufacture of malt beverages, principally beer, state associations of such manufacturers, and officers of such manufacturing corporations and state associations, all situated and doing business in the states of Oregon, Washington, California, Idaho and Utah. They were charged by indictment returned in the District Court for the Northern Division of the Western District of Washington, with a conspiracy and combination in violation of the Sherman Anti-Trust Act (R. 6). Demurrers were interposed on the ground that the indictment did not state facts sufficient to constitute an offense against the United States, and specifically did not state sufficient facts to constitute a violation of Secs. 1 and 3 of the Sherman Anti-Trust Act; that it does not appear from the indictment that the matters therein charged are within the jurisdiction of the Federal District Court, and that it affirmatively appears that the acts charged involved trade and commerce in beer, an intoxicating liquor within the meaning of Sec. 2 of the Twenty-first Amendment to the Constitution of the United States (R. 38). These demurrers were overruled by the District Court (R. 52) and appeals were taken to the Circuit Court of Appeals (R. 140-165), after the entry of pleas of *nolo contendere* and the imposition of sentence by the District Court (R. 56-133). The Circuit Court, by its judgment and opinion, review of which is here sought, affirmed the action of the District Court in overruling said demurrers.

IV.
SPECIFICATION OF ERROR

The Circuit Court of Appeals for the Ninth Circuit erred in affirming the action of the District Court in overruling the demurrers interposed by petitioners, and in affirming the several judgments of the District Court.

V.
ARGUMENT

Before the Circuit Court, three principal contentions were made by petitioners. Two of them were stated by the court as follows:

1. "Since the adoption of the Twenty-First Amendment the Federal Government has no jurisdiction over commerce among the states in intoxicants, or
2. "At least, the Federal Government is without authority to legislate in that field when any state or territory has occupied the field by appropriate legislative action."

An additional contention, not mentioned by the Circuit Court, may be stated as follows:

3. The indictment involving intoxicating liquor is insufficient in that it does not negative the fact that the acts charged have been commanded or implicitly encouraged by state laws.

I.
"Since the adoption of the Twenty-first Amendment the Federal Government has no jurisdiction over commerce among the states in intoxicants."

Adversely disposing of this contention, the Circuit Court relies upon

(a) *Adams Express Co. v. Kentucky*, 238 U.S. 190, a decision long prior to the adoption of the Twenty-

first Amendment and interpreting the Webb-Kenyon Act (37 Stat. 699, 27 U.S.C.A. 122), and the Wilson Act (26 Stat. 313, 27 U.S.C.A. 121).

(b) *Jameson & Co. v. Morgenthau*, 307 U.S. 171, a decision involving foreign commerce and not commerce among the states, and

(c) Legislative history and congressional construction as evidenced by the passage of the Federal Alcohol Administration Act (49 Stat. 977, 27 U.S.C.A. 201).

In reaching this conclusion the Circuit Court ignored the meaning and effect of the Twenty-first Amendment, as understood by its authors in the Senate.

> "* * * The purpose of Section 2 (of the Twenty First Amendment) is to restore to the states by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the states." (76 Cong. Rec. 4143)
>
> "* * * When our Government was organized and adopted, the states surrendered control over and regulation of interstate commerce. This proposal (the Twenty First Amendment) is restoring to the states, in effect, the right to regulate a single commodity—namely, intoxicating liquor." (76 Cong. Rec. 4141)

In the Federal Alcohol Administration Act, Congress substantially recognized this construction of the Twenty-first Amendment, making the effectiveness of many of its regulatory provisions dependent upon the adoption by the states of the same provisions (27 U.S.C.A. 205, *et seq.*)

Inconsistent with its conclusion, the Circuit Court found that

> "Originally, the regulation or suppression of the liquor traffic was a matter solely of local concern, except insofar as the authority of the states was circumscribed by the Commerce Clause. * * * While it (the Twenty First Amendment) does not in terms transfer power to the states it does free them from a previous constitutional restraint."

Freeing of the states from the restraints imposed by the Commerce Clause could only be accomplished by removing from the Federal Government the authority granted by the Commerce Clause. If that authority is removed by the Twenty-first Amendment, then the states have exclusive jurisdiction, and no authority remains in the Federal Government under the Commerce Clause with respect to intoxicating liquor.

U. S. v. Lanza, 260 U.S. 377.

This conclusion is supported by the decisions of the Supreme Court interpreting the Twenty-first Amendment.

State Board of Equalization v. Young's Market, 299 U.S. 59;

Mahoney v. Joseph Trinner Corp., 304 U.S. 401;

Indianapolis Brewing Co. v. Liquor Control Comm., 305 U.S. 391;

Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395;

Ziffin, Inc. v. Reeves, 308 U.S. 132.

We do not deem it necessary to make any further comment on the Circuit Court's reliance upon the case

of *Adams Express Co. v. Kentucky, supra.* The Circuit Court seems, however, to have placed unusual reliance upon *Jameson & Co. v. Morgenthau,* 307 U.S. 171. As above noticed, this decision involved only foreign commerce, and not commerce among the states. The Twenty-first Amendment does not deal, or purport to deal, with foreign commerce. While the grant of authority over foreign and interstate commerce is contained in the same clause of the Constitution (Art. I, Sec. 8), the two powers are essentially different and entirely separate.

Atlantic Cleaners and Dyers v. U. S., 286 U.S. 427.

The Twenty-first Amendment could not refer to foreign commerce because under our system of government there can be no importation into a state in foreign commerce, but such commerce is limited only to importation into the United States, and such commerce is between citizens of the United States, not citizens of a state and citizens of a foreign nation. See

U. S. v. Steffen, 100 U.S. 82, at 96;

Henderson v. New York, 92 U.S. 259, at 270;

U. S. v. Halliday, 3 Wall (U.S.) 407, at 417.

There is nothing in the *Jameson* case to indicate that the court considered that anything but an importation into the United States was involved. It is petitioners' contention that this decision is wholly inapplicable to the questions here involved.

2.

"At least, the Federal Government is without authority to legislate in that field when any state or territory has occupied the field by appropriate legislative action."

To a limited degree, the Circuit Court conceded the correctness of this contention. The court said:

> "Thus the broad theory of the Sherman Act—that trade should be free of artificial restraints—is in many respects incompatible with the policy of state liquor control legislation; and whenever such conflicts exist the Sherman Act must give way, just as the Commerce Clause itself gives way in identical circumstances. Where invocation of that Act tends to hamper or interfere with the enforcement of state laws regulatory of transportation or importation of intoxicants, the Act is unenforceable. By the terms of its own fundamental laws *the National Government has disabled itself from prosecuting as an offense that which a state has commanded or implicitly encouraged* as a means of controlling the traffic in intoxicants within its borders." (Emphasis added)

Assuming this to be a correct statement of the law, it does not support the court's ultimate conclusion. A reading of the state laws (set out in appendices) makes it apparent that the acts charged in the indictment were either "commanded or implicitly encouraged."

Indeed, the acts *commanded* by the state laws were held by this court to constitute a combination and conspiracy in restraint of trade and a violation of the

Sherman Act in *Sugar Institute v. United States*, 297 U.S. 535.

Despite a statement to the contrary by the Circuit Court, petitioners do affirm that the purpose of the state laws and regulations is to fix uniform prices. The vehicle created, and which petitioners are commanded to use, is apt and could have no other purpose or result. The device is not new. Whenever it has been used either by agreement, as in the *Sugar Institute* case, *supra*, or by command of government, as in the *National Industrial Recovery Act* (48 Stat. 195), the purpose has been to fix uniform prices.

3.

Inconsistencies in the Circuit Court opinion

The Circuit Court, after determining that the Twenty-first Amendment removed the constitutional restraint previously imposed on the states by the Commerce Clause, concluded:

> "Interstate commerce in liquor, not in violation of state laws, was left, as before, a matter of national concern."

From this, the court obviously meant that where such commerce did violate state law it was not a matter of national, but exclusively of local concern, hence without the jurisdiction of the Federal Government. Apparently unmindful of the effect of this conclusion, the court states:

> "* * * the states (here involved) have laws forbidding restraints of trade or the fixing or maintaining of artificial and noncompetitive prices for commodities generally, which laws are

applicable to beer as well as to other commodities."

If the court's interpretation of the law is correct, then the acts charged in the indictment are a violation of state law, and if petitioners are to be charged with the violation of any law it could only be of the state laws, not of the Sherman Act.

Where a state has a comprehensive act regulating the traffic in liquor, containing mandatory restraints of trade and also has a general statute forbidding restraints of trade, it has certainly completely occupied the field covered by the Sherman Act with respect to intoxicating liquor.

Under the Twenty-first Amendment who shall say to what extent the liquor law imposing restraints modifies or repeals the law forbidding restraints? It must be the state, the dominant lawmaker in that field.

State Board of Equalization v. Young's Market, supra.

The foregoing excerpts from the Circuit Court's opinion demonstrate an obvious inconsistency in its reasoning. The entire opinion is based upon a series of illogical conclusions springing from an apparent misconception of the necessary effect of the Twenty-first Amendment.

Petitioners recognize that the language used in the Twenty-first Amendment is not in keeping with the general language used in the Constitution in the granting to or limiting of powers of the Federal Government, or the reservation of powers to the states. By the language of the Twenty-first Amendment the

Federal Government is admittedly prohibited from exercising authority which was once granted to it by the Commerce Clause, and as a necessary corollary, to the extent of such prohibition the states have been relieved of the restrictions previously imposed upon them by the Commerce Clause. Undoubtedly, the language which would either, in terms, withdraw the authority from the Federal Government or affirmatively reserve or return such power to the states might admit of less confusion, but it could not change the result.

The Circuit Court recognizes, as it must under the decisions of this court, that the states have been freed from the restrictions of the Commerce Clause, which, of course, can only mean that the states are again the exclusive sovereign in the field of regulating commerce in intoxicating liquor. In its attempt to escape this conclusion, the Circuit Court held that so long as "interstate commerce in liquor" does not violate "state laws" it remains "a matter of national concern" and, therefore, subject to the jurisdiction of the Federal Government under the Commerce Clause.

This means that if interstate commerce in liquor is carried on in *conformity or compliance* with state law it is within the jurisdiction of the Federal Government. It can mean nothing else. Yet, the court itself held that insofar as the state laws here involved conflict with the Sherman Anti-Trust Act and the acts of the petitioners are done pursuant to and in compliance with such state laws, then the jurisdiction of the Federal Government fails and the Anti-Trust Act is in-

applicable. These conclusions are not only inconsistent, but contradictory.

It seems obvious to us that the confusion results from a failure to accept the simple meaning and effect of the Twenty-first Amendment. The Federal Government, since the Twenty-first Amendment, has jurisdiction only to enforce the Twenty-first Amendment by prohibiting the transportation or importation into any state or territory of intoxicating liquor in violation of the laws of such state or territory. This power and jurisdiction the Federal Government derives from the Twenty-first Amendment, and not from the Commerce Clause. In order to exercise its jurisdiction there must be found to be an importation or transportation which *violates* not a Federal but *a state law*. Beyond this the Federal Government has no jurisdiction over the commerce in intoxicating liquors among the states.

Thus, it is petitioners' contention that the Federal Government has jurisdiction over commerce in intoxicating liquors among the states, or with the territories, when such commerce *violates* the laws of such states or territories. The Federal Government has no jurisdiction under the Commerce Clause or the Twenty-first Amendment so long as the importation *does not violate* any state law, and certainly where such commerce *is in compliance* with state law. Petitioners believe this contention to be self-evident and consistent with the decisions of this court heretofore noticed.

4.

Even under the interpretation adopted by the Circuit Court of Appeals, the indictment is lacking in essential allegations to state a violation of the Sherman Act and disclose jurisdiction.

The opinion of the Circuit Court of Appeals recognizes that State laws pertaining to intoxicating liquors are paramount, and that if conflict exists between the State laws and the Sherman Act, "The Sherman Act must give way." The opinion says in part:

> "Thus the broad theory of the Sherman Act—that trade should be free of artificial restraints—is in many respects incompatible with the policy of state liquor-control legislation; and wherever such conflicts exist the Sherman Act must give way, just as the commerce clause itself gives way in identical circumstances. Where invocation of that Act tends to hamper or interfere with the enforcement of state laws regulatory of the transportation or importation of intoxicants, the Act is unenforceable. By the terms of its own fundamental law the national government has disabled itself from prosecuting as an offense that which a state has commanded or implicitly encouraged as a means of controlling the traffic in intoxicants within its borders." (R. 181)

What would ordinarily constitute a crime under the Sherman Act and confer Federal jurisdiction, may not do so in the case of intoxicating liquors. It will not do so if State laws have "commanded or implicitly encouraged" the acts charged. Since the enactment of the Twenty-first Amendment, the Sherman Act has

by implication contained an exception that may be paraphrased as follows:

> "Except, however, that in the case of intoxicating liquor, nothing done under the authority of the laws of any State governing the delivery into or use therein of intoxicating liquor, shall come within the scope of this Act or constitute a violation thereof."

The indictment in this case treats beer the same as any other commodity, and assumes that Federal jurisdiction (commerce) exists by reason of interstate shipment alone and that a crime has been committed under the Sherman Act if, in conjunction with interstate shipment, acts have been committed in restraint of trade. It entirely disregards the factor of State legislation.

The very fact that the charge concerns beer makes the bare allegation that there have been interstate shipments, insufficient to establish Federal jurisdiction. Federal jurisdiction will not exist *unless* consistent with State legislation.

Jurisdiction of a Federal Court is never presumed. It must be clearly and distinctly alleged. Facts must be pleaded which, if true, will positively establish jurisdiction. Jurisdiction cannot be left to conjecture, inference or presumption.

In *Brown v. Keene*, 8 Pet. 115, 8 L. ed. 885, Chief Justice Marshall said:

> "The decisions of this court require that the averment of jurisdiction shall be positive; that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient

that jurisdiction may be inferred argumentatively from the averments."

In *Robertson v. Cease*, 97 U.S. 646, 24 L. ed. 1057, the Supreme Court said:

> "As the jurisdiction of the Circuit Court is limited, in the sense that it has none except that conferred by the Constitution and laws of the United States, the presumption now, as well as before the adoption of the Fourteenth Amendment, is, that a cause is without its jurisdiction unless the contrary affirmatively appears."

See also

Mattingly v. N. W. Virginia R. R. Co., 158 U.S. 53, 39 L. ed. 894;

United States v. Morrissey, 32 Fed. 147, 152;

35 C.J.S. 913;

31 C.J. 668.

All the facts alleged in this indictment could be true and yet no offense exist and the Federal Court not have jurisdiction.

> "If the facts alleged may all be true, and yet constitute no offense, the indictment is insufficient. * * * Every material fact and essential ingredient of the offense—every essential element of the offense—must be alleged with precision and certainty."

27 Am. Jur. 621.

Fleischer v. United States, 302 U.S. 218, 82 L. ed. 208;

United States v. Standard Brewery, 251 U.S. 210, 64 L. ed. 229.

"Every ingredient of which the offense is composed must be accurately and clearly alleged."

United States v. Cook, 17 Wall. 174, 21 L. ed. 539.

"It cannot 'be left in doubt or to mere inference, from the words of the indictment, whether the offense charged was one within Federal cognizance'."

Blitz v. United States, 153 U.S. 308, 38 L. ed. 725, 728;

United States v. Cruikshank, 92 U.S. 542, 23 L. ed. 588.

Thus, under the very interpretation adopted by the Circuit Court of Appeals, and admitted as correct by respondent, the indictment is insufficient. In respondent's brief before the Circuit Court of Appeals, in answer to this point, reliance was placed exclusively on a quotation from 27 Am. Jur. 668 and the case of *United States v. Hutcheson*, 312 U.S. 219. Neither is applicable. The text has reference to an affirmative plea of the Statute of Limitations and cites as authority the case of *United States v. Cook*, 17 Wall. 168, 21 L. ed. 538. This opinion clearly states the rule that is applicable to the case at bar as follows:

"Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that

> no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed."

The case of *United States v. Hutcheson* is not in point. It holds that the facts pleaded determine whether a crime is stated, irrespective of the particular statute that the pleader conceived had been violated.

Although this ground for insufficiency of the indictment was vigorously pressed by brief and upon oral argument, the opinion of the Circuit Court of Appeals does not pass upon or even mention it. It presents an important and hitherto undecided question under the Twenty-first Amendment.

VI.

CONCLUSION

Petitioners believe that the same conflict and confusion with respect to the effect of the Twenty-first Amendment which existed in the several Circuit and District Courts prior to the decision in *State Board of Equalization v. Young's Market, supra,* continues to exist. We believe that the decision of the Circuit Court of Appeals for the Ninth Circuit which we here seek to review is a further demonstration of that confusion. This state of the law not only jeopardizes those who must be governed by it, but it also leaves both the Federal and State Governments without any guide in determining the respective policies by which they shall deal with this ever-troublesome subject. Sixteen states have adopted the so-called monopoly system of controlling the traffic in intoxicating liquor.

Other conflicts similar to the one here involved are almost certain to arise unless this court provides both the Department of Justice of the Federal Government and the several state commissions and legislatures with a clear and unmistakable rule as to the extent or limits of their respective authority.

We earnestly pray that this petition for a writ of certiorari be granted.

Respectfully submitted

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